prosecution. There is nothing in the evidence of the Accused nor in the evidence of the prosecution that raises any doubt, on a balance of probabilities, as to the guilt of the Accused. The evidence regarding Exhibit P11 is clear beyond any doubt; it was carried by the Accused before she was arrested; it shows an unbroken chain regarding Exhibit P11 despite the fact that it was not explained how Exhibit P14 turned up in court from the drawer of PW4.

IV. *Conclusions.*

The prosecution therefore had proved its case beyond any reasonable doubt. I therefore find the Accused guilty of the offence of trafficking in 644.50 grammes of cannabis on 17 April 1987 under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 and I accordingly convict her of the said offence.

The Accused though she said she did not know how old she was at the date she gave evidence, which was on 19 April 1993, but, she, nevertheless, gave us the clue if not the answer to her age when she said her eldest son was 25 years old. If her her eldest son is 25 years old in April 1993, he would be 19 years old in 1987. Since the eldest son of the Accused was already 19 years old in 1987, it must follow, it being impossible that her natural son to be younger than her, that the Accused was at least 19 years old in 1987. Of course, the Accused was much older than that since she can only be of child bearing ability after she had attained a certain age. This fact and together with my visual inspection of the Accused satisfied me that the Accused was at the date of the offence over the age of 18 years old. I must therefore pass the sentence which the law imposed which is death. Accordingly, the Accused is sentenced to death and she shall be hanged by the neck till she is dead.

The cannabis shall be destroyed by burning in the compound of the court and the destruction shall be witnessed by the Senior Assistant Registrar of the High Court in Borneo at Tawau but the destruction shall not be carried out until after the disposal of the appeal against the judgment herein. The cannabis shall in the meantime be kept by the police.

Reported by Shamsiah Begum Subhan.

TAI CHOI YU

v.

THE GOVERNMENT OF MALAYSIA & 2 ORS.

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[ORIGINATING SUMMONS NO. MR. 17 OF 1991]
6 MARCH 1993

ADMINISTRATIVE LAW: Passport not renewed - Decision deferred - Failure to issue certificate - Non payment of income tax - Whether rights and liberties affected - Whether discretion exercised judiciously.

INTERPRETATION OF STATUTES: Two different statutes - Whether same construction must be given - Objective of s. 104 - Test to be used for s. 104 - Is s. 104 directory - Construction of the word "leave or leaving".

WORDS AND PHRASES: Definition of "notice" under s. 104(3).

The plaintiff is an Advocate of the High Court in Borneo. A total sum of RM246,482.39 was due and owing by the plaintiff as income tax. A certificate pursuant to s. 104 of the Income Tax Act 1967 (Certificate) was issued by the 2nd defendant to the 3rd defendant. The plaintiff was not informed of the issuance of the certificate.

The plaintiff applied for the renewal of his passport as the pages of his then existing passport had been used up although its validity had not expired. The plaintiff's passport was not renewed and his main complaint was the issuance of the certificate as it affected his liberties and rights under the Constitution and that he has thereby suffered loss and damages.

Held:

[1] It is a settled principle of construction of a statute that two statutes need not have the same interpretation for their respective provisions.

[2] The construction of any statutory provision in the nature of s. 104 of the Income Tax Act will have to be based on the subjective test requirement. As such it is a matter for the 2nd defendant to decide and cannot be substituted by an objective test in a Court of

law. Further, it was also not for the Court to consider whether there was reasonable cause or grounds for the 2nd defendant to form an opinion and thereby issue the certificate. Section 138(3) of the Act can be relied on by the 2nd defendant so as not to reveal the evidence which led him to form the opinion.

[3] Section 104 comes under Part VII of the Act with the main heading of "collection and recovery of tax". Thus, the primary objective is to collect and recover taxes payable. As such a person may be prevented from leaving Malaysia until he has paid his taxes or has furnished security for their payment. Accordingly, even if the interpretation of the word "leave or leaving" in s. 104 is crucial, its meaning should not be restricted to mean "leaving for good".

[4] "Notice" referred thereto in s. 104(3) comes within the meaning of "notice purely as such as advice is given to the addressee of a state of affairs". Section 104(3) is only directory. If Parliament had intended to make the issuance of a notice a condition precedent on the validity or effectiveness of a certificate issued under s. 104 it would have stated so and the proviso would not have been included. Further to say that a "notice" must be served before or on the issuance of the certificate under s. 104 will defeat the purpose and effectiveness of Part VII of the Act in particular s. 104 itself.

[5] The liberty of the plaintiff is not being deprived by merely withholding the renewal of his passport. Article 5 of the Constitution does not extend to a person's liberty to travel abroad as in the first place there is no constitutional rights to leave the country or to travel. Secondly, he has not complied with the provision of the Act by paying his tax within the prescribed period and therefore action was validly taken pursuant to the provision of the Act.

[6] The 3rd defendant has deferred the decision on the application of the plaintiff to renew his passport. The defendant has the discretion to act as he did and acted reasonably in the circumstances and within the law in the exercise of his discretion. The 3rd defendant was lenient on the plaintiff by only deferring his decision. There is no reason why the 3rd defendant could not have told the plaintiff that his passport was retained though not his birth certificate and money as a measure to prevent him from leaving the country due to his outstanding income tax.

[Action dismissed with costs].

Cases referred to:

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(not foll)***
Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 / [1988] 1 CLJ 219 ***(cit)***
Sugumar Balakrishnan v. Chief Minister of State of Sabah & Anor. [1989] 1 MLJ 233 ***(cit)***
Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors. v. Lian Nyun Fui [1991] 1 CLJ 458 at page 461 F ***(foll)***
Government of Malaysia & Ors. v. Loh Wai Kong [1979] 2 MLJ 33 at 34 I ***(foll)***
Rhodesia Metals Ltd. (In Liquidation) v. Taxes Commissioner [1940] 3 All ER 422 PC ***(foll)***
Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co. [1992] 4 CLJ 2083 (H-I) (right) ***(cit)***
Ramsay (W.T) v. Inland Revenue Commissioners [1981] 2 WLR 449 ***(foll)***
Mangin v. Inland Revenue Commissioner [1971] 1 All ER 179 PC at page 182 ***(foll)***
Reed (Inspector of Taxes) v. Nova Securities Ltd. [1985] 1 WLR 193 ***(cit)***
Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(cit)***
Karam Singh v. Menteri Hal Ehwal Dalam Negeri [1969] 2 MLJ 129 ***(cit)***
Public Prosecutor v. Koh Yoke Koon [1988] 2 MLJ 301 / [1988] 2 CLJ 182 ***(not foll)***
R v. Chief Immigration Officer, Gatwick Airport, ex parte Kharrazi [1980] 3 AER 373 CA ***(not foll)***
Deputy Commissioner of Taxation (Tas) v. Naidoo [1981] 12 ATR 348 ***(cit)***
Navaradnam v. Suppiah Chettiar [1973] 1 MLJ 173 ***(foll)***
Tan Weng Chiong v. Public Prosecutor [1992] 1 AMR 49 : 333 ***(cit)***
Sarawak Electricity Supply Corporation v. Wong Ah Suan [1982] 2 MLJ 89 PC ***(cit)***
Re: Rengasamy Pillai; ex parte The Controller of Income Tax, Kuala Lumpur [1968] 1 MLJ 103 ***(foll)***
Montreal Street Railway Co. v. Normandin [1917] AC 170 ***(cit)***
State of Uttar Pradesh v. Manbodhan Lal Srivastava [1958] SCR 533 at page 546 ***(foll)***

Legislation referred to:

Evidence Act 1950, ss. 114(c), 138(3)
Income Tax Act 1967, ss. 103(4), (5), (5A), 104, 104(1), (2), (3), (5), 107A(2), 109(2), 109B(2), 115
Income Tax Assessment Act 1936-1981, s. 205
Courts of Judicature Act 1964 ss. 7(1) & (2)

Other sources referred to:

Judicial Review of Administrative Action, de Smith, 4th Edn. p. 142

For the plaintiff - Tai Choi Yu; M/s. Tai Choi Yu
For the 1st & 2nd defendants - Mohd. Bazain Idris, SFC (Nik Suhaimi with him)
For the 3rd defendant - Mahmud Hj. Abdullah, FC

JUDGMENT

Richard Malanjum JC:
In this action the plaintiff by way of originating summons seeks for the following relief namely:

1. A declaration that the document purported to be a Certificate issued by the 2nd defendant under s. 104 of the Income Tax Act 1967 addressed to the 3rd defendant and dated 27 June 1988 is null and void as being made *ultra vires* and/or *mala fide* and/or contrary to established principles of natural justice and/or fairness;
2. A Declaration that the order, speaking or otherise, of the 3rd defendant to refuse and/or reject the plaintiff's application for a passport and/or to stop and/or refuse and/or revoke the issue and/or delivery of a passport to plaintiff is null and void as being made *ultra vires* and/or *mala fide* and/or contrary to established principles of natural justice and/or fairness;
3. General damages;
4. Such other reliefs that this Court deems fit; and
5. Costs incidental to and ocassioned by this application.

A. *The undisputed facts:*

The events leading to the commencement of this action as gathered from the respective affidavits of the plaintiff affirmed on 23 April 1991, 20 June 1991, 7 August 1991 and 22 June 1992, the affidavits of Jong Foh Jan affirmed on 15 June 1991 and 23 July 1991 and the affidavit of Tuan Haji Rambli Adros Haji Yahya affirmed on 25 July 1991 may be summarised as follows:

1. The plaintiff is an Advocate of the High Court in Borneo;
2. Income tax was assessed as due and payable by the plaintiff for the years of assessments 1979 (additional), 1981 (additional), 1983 and 1984 (additional). A sum of RM23,016.95 was accordingly adjudged against the plaintiff under Miri High Court Suit No. MR.46/1986 by an order of the Court dated 9 October l989. However, further tax became due and in 1987 the total sum outstanding due from the plaintiff including the judgment sum was RM246,482.39. The plaintiff made some payments between 14 November 1987 and 15 February 1988 totalling RM7,149.75 leaving the balance of RM239,332.64 when the impugned Certificate dated 27 June 1988 (hereinafter called "the Certificate") was issued pursuant to s. 104 of the Income Tax Act, 1967 (Act 53) (hereinafter called "the Act") by the Director of Inland Revenue Sarawak, the 2nd defendant, to the Director of Immigration, Sarawak, the 3rd defendant.
3. Although the Certificate was issued the plaintiff was not prevented from leaving Sarawak and Malaysia. He was also not informed of the issuance of the Certificate.
4. Further payments were made by the plaintiff on 14 June 1988 and 2 July 1988 totalling RM6,812.70. But second additional tax assessment was made for the years 1979 to 1986 resulting in the sum outstanding as tax due and payable amounting to RM368,744.89 as of 15 June 1991.
5. No further payment has been made by the plaintiff and there is an appeal, partheard, before the Special Commissioners.
6. On 20 April 1990 the plaintiff applied for the renewal of his passport at the Immigration Department, Miri, Sarawak as the pages of his then existing passport had been used up although its validity was only expiring on 9 September 1990. In effect therefore the application was for a renewal of his passport before the expiry date.
7. For the application for renewal the plaintiff submitted the following:

   (i) the original extract copy of his birth certificate enclosed together with the duly completed application forms; and
   (ii) his payments of RM100 and an additional sum of RM4 for postage fee with receipts duly issued as No. 087852 and No. 343991 respectively.

   These documents were despatched to the Immigration Department Kuching.

8. On or about 22 April 1990 the plaintiff made a telephone call to the Immigration Department Kuching enquiring about his application. The plaintiff was informed by an officer in the passport section of the said Department of the existence of the Certificate.
9. Between 20 April 1990 and 23 April 1991 there were communications between the plaintiff and the Department of Inland Revenue Sarawak (hereinafter called "the Department") and may be itemised as follows:

   (a) On 2 August 1990 the Department made an offer to the plaintiff to pay by monthly instalment in the sum of RM10,000 commencing August, 1990;
   (b) On 3 August 1990 the plaintiff counter-offered payment of the sum of RM5,000 per month;
   (c) On 25 August 1990 the Department informed the plaintiff of its acceptance of the counter-offer;
   (d) On 29 August 1990 the plaintiff asked for his passport and that he would pay the instalment of RM5,000 within one month from the return of his passport, presumably renewed;
   (e) On 10 September 1990 the Department informed the plaintiff in writing that it could only revoke the Certificate and the consequential action thereof when the plaintiff has furnished a bank guarantee for settlement of the tax outstanding as specified in the Certificate. There is no evidence adduced that such request by the Department has been complied with otherwise this present action would not be before this Court.

10. There was also communication between the plaintiff and the 3rd defendant in that on 12 April 1991 through his Advocates the plaintiff wrote to the 3rd defendant seeking for the reasons in the delay of the renewal of his passport. The said letter requested for a reply within 7 days failing which the plaintiff would assume that his allegation to wit, the refusal to renew the passport due to the Certificate, was true. The 3rd defendant did not reply to the letter though the letter was received on 20 April 1991.
11. Hence, on 23 April 1991 the plaintif commenced this action by way of originating summons as amended by an order of the Court dated 16 March 1992.
12. The notice of issuance of the Certificate dated 16 May 1991 was served on the plaintiff by the 2nd defendant on 17 May 1991.

B. *The plaintiffs complaint:*

The plaintiff who appears in person being an Advocate ofthe High Court in Borneo says that his basic complaint is the issuance of the Certificate by the 2nd defendant. Such an action according to the plaintiff has affected his liberties and rights under the Constitution and he has thereby suffered loss and damage.

C. *The main issue: s. 104, its scope and the law.*

The plaintiff submits that there are several questions to be considered by this Court in this action. I have considered the questions posed and I am of the view that the main issue to be examined is the scope of s. 104 of the Act in relation to the actions of the 2nd and 3rd defendants which were complained of.

(i) *The law: Statutory interpretation and current judicial approach to taxing statutes:*

Section 104 of the Act provides:

> 104. Recovery from persons leaving Malaysia.
>
> (1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying
>
> (a) altax payable by him (whether or not due or due and payable);
> (b) all sums payable by him under s. 103 (4), (5) or (5A); and
> (c) all debts payable by him under s. 107A(2) or 109(2) or 109B(2)
>
> may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

(2) Subject to any order issued or made under any written law relating to banishmentor immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subsection (1) -

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer,

the statement or the payment, as the case may be, shall be sufficient authoriity for allowing that person to leave Malaysia.

(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or s. 115 (2).

(6) In this section -

"Commissioner of Police" includes a Chief Police Officer;

"Director of Immigration" means the Director of Immigration in Sabah, Sarawak or West Malaysia;

"immigration officer" means a public officer having offcial duties in connection with the control of immigration into Malaysia or any part of Malaysia.

At this juncture perhaps it may be appropriate to recapitulate the principles of construction of statutes including taxing statute as well as the current judicial approach to the rights of persons in relation to their obligations to pay taxes. But before proceeding any further let me dispose of one issue raised by the learned Senior Federal Counsel appearing for the 1st and 2nd defendants. He said that the application of the plaintiff is in the nature of an application for an order of certiorari and therefore due to lapse of time it should not be entertained. My short answer to this is that in this country the restriction expounded by Lord Diplock in *O'Reilly v. Mackman* [1982] 3 All ER 1124 does not apply. An applicant is at liberty to apply for a declaration though certiorari may be more appropriate. [See: *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12; *Sugumar Balakrishnan v. Chief Minister of State of Sabah & Anor.* [1989] 1 MLJ 233].

It is a settled principle of construction of a statute that two statutes need not have the same interpretation for their respective provisions. In the case of *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors. v. Lian Nyun Fui* [1991] 1 CLJ 458 at page 461 F, Abdul Hamid Omar LP said this:

> It is significant to note that in the instant case we are dealing with a different Enactment and therefore special attention must be directed to the provisions of that Enactment.

And it was also said by Suffian LP in Government of *Malaysia & Ors. v. Loh Wai Kong* [1979] 2 MLJ 33 at 34 I (right) that:

> ... It is well-settled that the meaning of words used in any portion of a statute - and the same principle applies to a constitution - depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appeal and that they may be given a wider or more restricted mean-ing than they ordinarily bear if the context requires it.

In the case of *Rhodesia Metals Ltd. (In Liquidation) v. Taxes Commissioner* [1940] 3 All ER 422 PC, Lord Atkins said at page 425 H that 'decisions on the words of one statute are

seldom of value in deciding on different words in another statute. Dictionary meanings of words in statutes may also be resorted to as 'the dictionary, though not to be taken as an authoritative exponent of meanings of words used in statutes, is an important means of ascertaining the ordinary sense of words in accordance with literal construction of words - the primary rule', per Peh Swee Chin, SCJ at page 417 in *Ketua Pengarah Hasil Dalam Negeri v. Kim Thye & Co.* [1992] 4 CLJ 2083 (H-I) (right).

It was also said in *Ramsay (W.T.) v. Inland Revenue Commissioners* [1981] 2 WLR 449 per Lord Wilberforce at page 456 that:

> A subject is only to be taxed upon clear words, not upon "intendment" or upon the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are "clear words" is to be ascertained upon normal principles: these do not confine the Courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relavant Act as a whole, and its purpose may, indeed should, be regarded.

In *Mangin v. Inland Revenue Commissioner* [1971] 1 All ER 179 PC at page 182, Lord Donovan said this, *inter alia*,

> ... the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice n or absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

With regard to the attitude ol the Courts on taxing statutes, their schemes and purposes, it has been said that it is one of acknowledgment that revenue from taxation is essential to the running of the state, and that the duty of the judiciary is to aid its collection while remaining fair to the subject. [See: Bennion on Statutory Interpretation (2nd Edition) p. 587]. It has also been said that the tax authorities owe a duty to the general body of taxpayers to ensure that tax due is efficiently collected - See: *Reed (Inspector of Taxes) v. Nova Securities Ltd.* [1985] 1 WLR 193.

(ii) *Section 104 and the exercise of discretion by the 2nd defendant*

It is not disputed between the parties that s. 104 of the Act confers statutory discretion to the relevant persons. But the plaintiff contends without elaboration that in respect of the 2nd defendant he did not exercise his statutory discretion. With respect, the fact that the Certificate was issued by the 2nd defendant pursuant to s. 104 of the Act indicates the 2nd defendant did exercise his statutory discretion. As to whether or not his exercise of discretion falls within any or all of the classifications or tests as laid down by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 is another matter which I will consider shortly.

The plaintiff submits that before the 2nd defendant could reasonably exercise his statutory discretion he must have the relevant evidence to form an opinion that he (the plaintiff) was about or likely to leave Malaysia for good. The plaintiff says that nothing is shown in the affidavits filed on behalf of the 2nd defendant to that effect. The plaintiff further states that he does not even know if the Certificate was actually issued by the 2nd defendant. On this minor issue l think it can be disposed of by reference to s. 114(e) of the Evidence Act 1950. As the plaintiff has not substantiated his statement such a presumption therefore applies.

On the issue of forming an opinion, it is settled law that the construction of any statutory provision in the nature of s. 104 of the Act will have to be based on the subjective test requirement. As such it is a matter for the 2nd defendant to decide and cannot be substituted by an objective test in a court of law. [See: *Karam Singh v. Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129]. Further, it is also not for this Court to consider whether there was reasonable cause or ground for the 2nd defendant to form an opinion and there by issuing the Certificate. [See: *Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301]. I am also of the view that s. 138(3) of the Act can be relied too by the 2nd defendant so as not to reveal the evidence which led him to form the opinion. Accordingly, I do not think the nature of 'leaving' the country by a person is crucial.

But the plaintiff says that it is crucial and in forming an opinion by the 2nd defendant the word 'leave' or 'leaving' in s. 104 of the Act must be construed to mean 'leaving for good'. He cites *R. v. Chief Immigration Officer, Gatwick Airport, ex parte Kharrazi* [1980] 3 AER 373 CA, which dealt with the United

Kingdom Immigration Act 1971 and the Rules made thereunder. Since he has no intention of leaving Malaysia for good the piaintiff submits that there is no necessity for the issuance of the Certificate. P!aintiff further says that to give an otherwise meaning to the word 'leave' or 'leaving' would give too wide and too broad a discretion to the 2nd defendant and would be contrary to Article 8 of the Federal Constitution. As such he says that it should not be interpreted as to violate Article 8.

The learned Senior Federal Counsel on the other hand says:

(i) that the word "leaving' need not necessarily mean "leaving for good" as the word has to be looked at in the context of the Act as a whole;
(ii) that the word "likely" in s. 104(1) denotes that mere suspicion is sufficient for the 2nd defendant to issue the Certificate;
(iii) that a taxpayer cannot leave the country for any reason whatsoever without first paying his taxes otherwise he might spend his money elsewhere;
(iv) that the word "leave" should be given a liberal interpretation otherwise the 2nd defendant would not be able to exercise his duty to collect taxes which is his primary function; and
(v) that the issuance of the Certificate is one of the modes which can be employed by the 2nd defendant in order to collect the outstanding tax from the plaintiff.

In the case of *Deputy Commissioner of Taxation (Tas) v. Naidoo* [1981] 12 ATR 348 which neither Counsel cited, the Supreme Court of Tasmania, Everett J. appeared to accept the meaning of 'leave' in s. 205 of the Income Tax Assessment Act 1936-1981 as leaving Australia permanently. However, in that case the meaning of the word 'leave' was not disputed by the Deputy Commissioner of Taxation. As such there was therefore no argument on how the word 'leave' should be construed in the context of that particular statute.

Section 104 comes under Part VII of the Act with the main heading of "Collection and Recovery of Tax". Thus, the primary objective is to collect and recover taxes payable. I agree therefore with the learned Senior Federal Counsel that s. 104 is one of those provisions in-tended to achieve the primary objective. As such a person may be prevented from leaving Malaysia until he has paid his taxes or has furnished security for their payment. Accordingly, it is my view that even if the interpretation of the word 'leave' or 'leaving' in s. 104 is crucial, its meaning should not be restricted to mean "leaving for good" as suggested by the plaintiff. In my view *Kharrazi's case* (*supra*) is not applicable here as it was dealing with a different statute with a different objective. (See: *Lian Ngui Fui's case* (*supra*); *Loh Wai Kong's case* (*supra*) and *Ramsay (W.T.) v. Inland Revenue Commissioners* (*supra*). Further, to do so would entail adding the words 'for good' which Parliament did not do so. [See: *Navaradnam v. Suppiah Chettiar* [1973] 1 MLJ 173 in particular the judgment of Ong Hock Sim FJ); *Tan Weng Chiong v. Public Prosecutor* [1992] 1 AMR 49 : 333]. The suggested interpretation by the plaintiff would also defeat the primary objective since l do not think any person knowing that he has taxes to pay would declare or even make it easily available any evidence that he is about to leave the country permanently. [See: *Mangin v. Inland Revenue Commmissioner* (supra)]. My view is also fortified by a judicial pronouncement that there is no constitutional right of a Malaysian citizen to leave the country. In the case of *Government of Malaysia & Ors. v. Loh Wai Kong* (*supra*) at page 354 H (left) Suffian LP said:

> Does a citizen have a fundamental right to leave the country with or without a passport? In our judgment no such right is guaranteed by the constitution and Mr. Jagjit with respect correct in saying that in certain circumstances the Government has power to stop a citizen (or indeed even a non-citizen) from leaving; ... It is impossible and undesireable to catalogue the other circumstances in which the Government may stop a person from leaving, and each case will have to be considered in the light of its own facts.

In that case it was conceded by the learned Counsel that 'even a passport holder had no right to travel abroad, if, for instance, he had not paid his income tax'. [See: p. 34 I of *Government of Malaysia & Ors. v. Loh Wai Kong* (*supra*)].

With regard to the argument on violation Article 8 of the Constitution the plaintiff says that he is being discriminated as he is prevented from leaving the country even for

a short period if the word 'leaving' is given a different meaning from the one he has suggested. I find no merit in it. As long as the 2nd defendant acts within the law, in this case, s. 104, I do not see how it can be said to be in violation of Article 8. There is firstly no constitutional right to leave the country. Secondly, on the issue of being discriminated I do not think so. The 2nd defendant has the statutory discretion to be exercised '*bona fide*, fairly, honestly and honourably' in order to achieve the primary object of the Act. Where the exercise is not as such and the plaintiff can show to that effectthe Court can review the exercise of discretion [see: *Government of Malaysia & Ors. v. Loh Wai Kong* (*supra*)]. I find however no indication or evidence to that effect from the materials before me in this case except the assertion of the plaintiff.

The plaintiff next says that the exercise of the discretion by the 2nd defendant was not in compliance with the rules of natural justice and/or fairness. The thrust of his argument is that there was a failure by the 2nd defendant to serve him the necessary notice under s. 104(3). He says that:

(a) the service of the notice is mandatory and not directory;
(b) it must be done on or before the issue of the Certificate due to the use of the word 'issue' instead of'issued'; and
(c) failure to do so is a procedural impropriety and the decision thereof is *ultra uires*.

It is not disputed in this case that the plaintiff was only served with the notice of the issuance of the Certificate on 17 May 1991, almost 3 years from the issuance of the Certificate. The plaintiff therefore submits that:

(1) he has been prejudiced as he has been deprived of the remedy of the writ of certiorari and that damage and loss have already been done by the time he was served with the notice;
(2) that only declaration is left available to him;
(3) that this action would have been timebared by 26 June 1991; and
(4) that the delay in the service of notice has prevented him to mitigate his loss and damage and that accordingly there has been a failure to comply with the elementary rules of natural justice and fairness.

The plaintiff cited several authorities including *Sarawak Electricity Supply Corporation v. Wong Ah Suan* [1982] 2 MLJ 89 PC. It is also the contention of the plaintiff that the service of the notice of the issue of the Certificate cannot be dispensed with. He says that the question of non-receipt only arises when the service is by registered post and therefore the 2nd defendant cannot rely on the proviso of s. 104(3) unless the service is by registered post.

I think it may be appropriate to consider the issue of notice by examining the nature of notice intended under s. 104(3). In the case of *Re: Rengasamy Pillai; ex parte The Controller of Income Tax, Kuala Lumpur* [1968] 1 MLJ 103 Chang Min Tat J. (as he then was) in considering s. 7(1) and s. 7(2) of the Courts of Judicature Act 1964 expressed the view as follows at page 105 I to p. 106 B:

> In my view the word "notices" therein mentioned refers to such mandatory processes as for example, notices of writ to be served out of jurisdiction, in other words, to processes where the addressee is, by the Chief Justices in the name of the Yang di-Pertuan Agong, commended to do something upon penalty of having a judgment entered or an order made against him and **does not refer to notices purely as such where advice is given to the addressee of a state of affairs**. Notices of the latter sort are, in my view, covered by s. 7(2) of the Courts of Judicature Act, 1964, which reads:
>
> > 7.(2) All summonses, warrants, orders, rules, notices and other processes whatsoever, whether civil or criminal, issued or made by or by the authority of any court respecting any cause or matter within its jurisdiction shall have full force and effect and may be served or executed anywhere within Malaysia.
>
> (emphasis added)

Though the learned Judge was dealing with a different statute in that case I think the principle thereof that is, on the nature or type of notice and its effects, can be applied to the present case. Accordingly, in my view the 'notice' referred threto in s. 104(3) comes within the meaning of 'notice purely as such where advice is given to the addressee of a state of affairs'.

It is also my view that s. 104(3) is only directory. It has been said in *Montreal Street Railway Co. v. Normandin* [1917] AC 170 that no general rule can be laid down ion construing whether the provisions of a statute are directory or imperative and that in every case the object of the statute must be looked at. Indeed in *State of Uttar Pradesh v. Manbodhan Lal Srivastava* [1958] SCR 533 Sinah J. said this at p. 546:

> Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directly in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on 'Saturday Construction' - article 261 at p. 516, is pertinent:
>
> > The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other...

[See also: de Smith's Judicial Review of Administrative Action 4th Edition at p. 142]. I am also fortified in holding such a view by the proviso of s. 104(3). If Parliament had intender to make the issuance of a notice a condition precedent on the validity or effectiveness of a certificate issued under s. 104 it would have stated so and the proviso w puld not have been included. Further, to say that a 'notice' must be served before or on the issuance of a certificate under s. 104 will, in my view, defeat the purpose and effectiveness of Part VII of the Act in particular s. 104 itself. Would be evaders of income taxes will be able to know first of the issuance of certificates before the relevant authorities such as the Immigration or Police. Such knowledge would hasten their exit without paying their outstanding taxes. If such situation arises the 2nd defendant could not be said to be effectively managing the collection of taxes due. [See: *Reed (Inspector of Taxes) v. Nova Securoties Ltd.* (*supra*). Accordingly, I do not find any merit in the argument of the plaintiff in disputing the validity or effectiveness of the Certificate issued on the basis of late or non-service of the notice under s. 104(3) of' the Act. Anyway in the present case the plaintiff' was informed of the issuance of' the Certificate on 22 April 1990 by an Immigration officer and the plaintiff had in fact responded to the Department by making proposals in order to settle his outstanding income tax. It was only about one year later that the plaintiff commenced action and raised several issues which were not raised at the first opportunity available. I do not think such an attitude is in tandem with an application tor a declaration which is a discretionary remedy.

On the issue of being prejudiced and thereby having suffered loss and damage as a result of the issuance of the Certificate without the notice being served before or on the issuance of the Certificate or due to the delay in the service as contended by the plaintiff; I only have to say that even though the Certificate was dated 27 June 1988 it is not in dispute that up to 20 April 1990 the plaintiff was not barred from going out of the country. Indeed he must have been travelling so much that even before his passport expired the pages were already used up. The plaintiff has therefore no reason to say that he has been prejudiced by the issuance of the Certificate especially knowing that he owes the Department in income tax. As to his complaint of loss and damage if any the same could have been avoided if he had paid his outstanding tax earlier. I find no merit in the complaint.

The plaintiff also says that owing to the delay of the 2nd defendant in serving the notice as required under s. 104(3) of the Act he did not have the opportunity to rebut any evidence alleging that he was intending to leave Malaysia. Having construed the effect of s. 104(3) as above such argument becomes invalid. It is ironic that the plaintift complains of being unfairly treated when he has not been fair to the country by paying his income tax speedily. The plaintiff blames the bureaucracy of the country which depends on tax-payers' money on its efficiency yet as a tax-payer the plaintiff is not responding by prompt payment of his income tax.

Accordingly, in this case I do not think the exercise of statutory discretion by the 2nd respondent, namely, in issuing the Certificate, can be said to have been tainted with any element of illegality, irrationality or procedural impropriety.

In view of the conclusion I have reached I do not think it is necessary to deal with the other secondary arguments submitted by the plaintiff such as that the grant of the declaration prayed for will not cause any breakdown in the administrative and executive machinery of the 1st defendant.

(iii) *Scction 104 and the Constitution*:

It is also the submission of the plaintiff that in the event that his first contention fails, he submits that s. 104 of the Act is unconstitutional being contrary to Articles 5, 8, 11 and 13 of the Federal Constitution. Article 8 and s. 104 have been considered earlier on in this judgment.

On Article 5, the liberty of the plaintiff is not being deprived by merely withholding the renewal of his passport. I do not think Article 5 extends to a person's liberty to travel abroad as in the first place there is no constitutional right to leave the country or to travel. Secondly, he has not complied with the provisions of the Act by paying his tax within the prescribed period and therefore action was validly taken pursu-ant to the provisions of the Act. [See: *Govern-ment of Malaysia & Ors. v. Loh Wai Kong* (*supra*)].

With regard to Article 11, there is nothing in the Constitution to state that a citizen shall be entitled to profess and practise his religion even outside the country. It cannot be so as in the first place there is no constitutional right to travel or leave the country.

As for Article 13, the plaintiff says that as a result of the Certificate he cannot now manage and protect his properties overseas. This argu-ment is fallacious. The plaintiff appears to be blaming others for the consequences of his own doing. If he had paid his income tax in accor-dance with the law there would have been no question of him being unable to leave the country. Further, in my view there is nothing stated in Article 13 that supports the argu-ment of the plaintiff.

Accordingly I find no merit on this ground as well.

(iv) *Section 104 and the exercise of discretion by the 3rd defendant*

The plaintiff says *inter alia*:

(i) that the 3rd defendant has no power upon the request of the 2nd defendant to refuse and/or to 'defer his decision' indefinitely on his application for a renewal of his international passport and to impound his birth certificate and his RM100 in order to prevent him from leaving Malaysia;

(ii) alternatively, the 3rd defendant had trespassed beyond the statutory limits of his powers when he gave the order as he did;

(iii) the 3rd defendant upon request from the 2nd defendant did not exercise his statutory discretion or if he did, he exercised it unreasonably and not in compliance with the rules of natural justice and/or fairness; and

(iv) the delay in replying to his application by the 3rd defendant amounts to refusal.

In reply to the contentions of the plaintiff, learned Federal Counsel Encik Mahmud, appearing for the 3rd defendant submits that:

(a) the 3rd defendant did not make any order but only deferred his decision on the application of the plaintiff after considering the request of the 2nd defendant. He says that such deferment was correct, valid and in accordance with the law. He also submits that it is for the plaintiff to show that he has cleared his tax with the 2nd defendant before the 3rd defendant makes his decision;

(b) Section 104 of the Act makes it mandatory for the 3rd defendant to decide the way he did upon receipt of a request from the 2nd defendant irrespective of the nature of 'leaving' the country by the plaintiff;

(c) since no decision has been made on the application of the plaintiff it is premature to allege that there has been a breach of the rules of natural justice; and

(d) a passport is not as of right. The 1st defendant has the discretion whether or not to issue a passport to a Malaysian citizen.

It seems to me that the plaintiff is mainly complaining of not being given the renewal of his passport by the 3rd defendant after he has

submitted his application and after failing to get a reply from the 3rd defendant on his application. In the first place it should be noted that as the law stands a passport is not as of right. In the case of *Government of Malaysia & Ors. v. Loh Wai Kong* (*supra*) Suffian LP said at page 36 D (left):

> We have already expressed the view that a citizen has no fundamental right to leave the country and travel abroad, and **here we would say that in our view he does not have a right, not even a qualified right, to a passport,** though we must further add that in our view, though the citizen does not have a right under our constitution and our law to a passport, the Government should act fairly and *bona fide* when considering applications for a new passport or for the renewal of a passport ... and should, like Government in the United Kingdom, rarely refuse to grant them.
>
> (emphasis added).

Further down, his Lordship on the same page E (right) said:

> ... **The Government has a discretion whether or not to issue, delay the issue of or withdraw a passport**: ... The exercise of this discretionary power is subject to review by a court of law.
>
> (emphasis added).

In this case the 3rd defendant says that no decision has yet been made on the application of the plaintiff for the renewal of his passport. The decision has only been deferred. In my view the 3rd defendant has the diccretion to act as he did. The remaining issue is whether or not he has exercised his discretion *bona fide* fairly, honestly and honourably.

In exercising his discretionary power on the application of the plaintiff, the 3rd defendant must consider, in my view, his compliance with the existing laws of the country so as not to defeat or obstruct their purposes and objectives. In the present case the 3rd defendant in his affidavit affirmed on 25 July 1992 paragraphs 4 and 5, stated thus:

> 4. I verily state that I did receive a Certificate from the Director of Inland Revenue, Sarawak dated 27 June 1988 of which was exhibited in plaintiff's affidavit as "TCY2".
>
> 5. I further state that after considering the request by the Director of Inland Revenue, I decided to defer ny decision on the plaintiff's application for a passport unless and until the plaintiff can produce evidence to the Immigaration Department that he had settled to debt owed by him to the Department of Inland Revenue.

The 3rd defendant denied making any order, speaking or otherwise, as alleged by the plaintiff.

Section 104(2) of the Act obliges the 3rd defendant to take or cause to be taken all such measures to prevent any person referred to in a certificate issued by the 2nd defendant from leaving Malaysia. One such measure is to deny that person any document of travel. Thus, in my view, the 3rd defendant has acted reason-ably in the circumstances and within the law in the exercise of his discretion. I would think that the 3rd defendant was lenient on the plaintiff by only deferring decision. I find no reason why the 3rd defendant could not have told the plaintiff that his passport was re-tained though not his birth certificate and money as a measure to prevent him from leaving the country due to his outstanding income tax. The plaintiff says that the 3rd defendant acted mechanically and did not ex-ercise his discretion after he received the Cer-tificate from the 2nd defendant. I find it diffi-cult to agree with the plaintiff. First, the plaintiff did not amplify his argument by indi-cating what the 3rd defendant should have done after receiving the Certificate Secondly, the plaintiff says that s. 104(2) is to be read with s. 115 of the Act and therefore the 3rd defendant has only the power of arrest. This construction of s. 104(2) and s. 115 cannot be correct. In my view s. 104(2) and s. 115 are complementary in that in the event the mea-sures taken under s. 104(2) are ignored or evaded the power given under s. 115 may be invoked.

The plaintiff also contends that in the exercise of his discretion the 3rd defendant did not comply with the elementary rules of natural justice and/or fairness I find no merit in such a contention As admitted in paragraph 6.1 of his affidavit affirmed on 23 April 1991, the plaintiff was told of the reason for withholding the renewal of his pasport. Having been told and if the reason was unjustified the plaintiff should have made representation to rebut the reason given. Instead, the plaintiff negotiated with the 2nd defendant and he

failed to fulfil the terms stipulated (see paragraphs 5, 6, 7, 8 and 9 of the affidavit of Jong Foh Jan affirmed on 23 July 1991). In my view there was nothing else the 3rd defendant could have done to be fair to the plaintiff in the circumstances. It is to be noted that s. 104 is also a preventive section and its purpose would be defeated if nothing could be done until and unless the affected party has been given all the hearings or representations as the plaintiff seems to suggest.

For the foregoing reasons in my judgment the exercise of statutory discretion by the 3rd defendant was reasonable, independent of the decision of the 2nd defendant and in compliance with the elementary rules off natural justice and/or fairness. Accordingly his actions are theref'ore not *ultra vires*, null and void.

D. Conclusion:

In view of the conclusions I have reached on the issues raised by the plaintiff and as declaration is a discretionary remedy and in view of s. 104(5) of the Act I therefore refuse to grant the declarations prayed for. Accordingly, the question of assessment of damages does not therefore arise. This action is dismissed with costs to the defendants to be taxed.

TAI CHOI YU (SUING AS ACQUIRER)

v.

THE GOVERNMENT OF MALAYSIA & 2 ORS.

HIGH COURT, MIRI
TUAN RICHARD MALANJUM JC
[CIVIL SUIT NO. 2 OF 1992]
12 APRIL 1993

REVENUE LAW: Real property gains tax - Real Property Gains Tax Act 1976 - Assessment - Judgment obtained under O. 26A Subordinate Courts Rules 1980 - Appeal by plaintiff pending - Action commenced by plaintiff seeking declarations that assessment null and void and damages - Conditional appearance entered - O. 12 r. 7 RHC 1980 - Application by defendants to strike out writ and statement of claim - Application by plaintiff to set aside defendants' application; plaintiff's application - Defendants' application made after period specified in O. 12 r. 7 - Whether leave for extension obtained - No objection from plaintiff - Effect - Defendants' amended application - Whether defendants entitled to proceed also under O. 18 r. 19 & O. 92 r. 4 RHC 1980 - Costs - Amendment to defendants' application after plaintiff's application filed - Effect; defendants application - reservice of writ - Costs - Whether defendants entitled to costs - Issue of improper party - Whether properly before the Court - Action commenced by plaintiff - relief claimed and issues raised in statement of claim - Whether Court had jurisdiction - Issues raised in action - Whether connected with assessment of gains tax - Section 102(9) Income Tax Act 1967 - Meaning of appeal.

CIVIL PRACTICE & PROCEDURE: Application of defendants to set aside writ and statement of claim - Improper joining of party - Whether issue before Court - Entry of conditional appearance under O. 12 r. 7 RHC 1980 - Whether defendants entitled to make an application to set aside also under O. 18 r. 19 & O. 92 r. 4; jurisdiction - Grievance regarding assessment of capital gains tax - Whether the Court the proper forum - Court judgment already obtained and appeal pending - Whether plea of res judicata applicable - Action for declaratory relief and damages - Whether Court had jurisdiction over issues raised in action.

The plaintiff acquired a parcel of land in Miri in 1983, but no notification was given to the 2nd defendant of the acquisition as required under s. 12(1)(a) of the Real Property Gains Tax Act 1976 ('the 1976 Act'). On receipt of information pertaining to the transaction,